



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Cooper*, 2019 NLCA 18

Date: April 1, 2019

Docket Number: 201801H0058

BETWEEN:

DAVID COOPER

APPELLANT

AND:

HER MAJESTY THE QUEEN

FIRST RESPONDENT

AND:

EASTERN HEALTH

SECOND RESPONDENT

Coram: Fry C.J.N.L., White and Goodridge JJ.A.

Appeal From: Newfoundland and Labrador Review Board
(Part XX.1 *Criminal Code of Canada*)

Appeal Heard: January 15, 2019

Judgment Rendered: April 1, 2019

Reasons for Judgment by: White J.A.

Concurred in by: Fry C.J.N.L. and Goodridge J.A.

Counsel for the Appellant: Jennifer A. Curran

Counsel for the First Respondent: Sheldon B. Steeves

Counsel for the Second Respondent: Janie L. Bussey Q.C.

White J.A.:

[1] This is an appeal of an order of the Newfoundland and Labrador Review Board (the Board) ordering the discharge of an accused, subject to conditions, “when clinically indicated”.

[2] In 2013, the appellant, David Cooper, was found not criminally responsible on account of a mental disorder of the offence of assault causing bodily harm. The finding led to him being subject to the jurisdiction of the Board.

[3] In 2017, the Board ordered that Mr. Cooper be discharged subject to conditions. In early 2018, Mr. Cooper was returned to the Waterford Hospital, based on a failure to comply with the conditions of his 2017 discharge.

[4] The Board held a review on March 6, 2018 at which time it heard evidence from members of Mr. Cooper’s treatment team, including his psychiatrist.

[5] On March 26, 2018, the Board found Mr. Cooper to be in breach of its 2017 order and further concluded that “... the Accused’s mental disorder is stable and under control. For that reason we are of the view that he is not of such danger to the safety of the public as to require further detention in hospital.”

[6] The operative portion of the order of the Board begins with:

IT IS ORDERED that pursuant to section 672.54(b) of the *Criminal Code of Canada* when clinically indicated the accused be discharged subject to the following conditions, that he:

...

[7] At issue is whether it was an error of law for the Board to order the appellant be discharged “when clinically indicated”.

[8] A preliminary issue related to mootness, as Mr. Cooper was discharged from hospital on May 11, 2018. The appellant and the Crown both suggested that this Court should hear the appeal on the basis that it is in the public interest to give direction regarding the use of a pre-condition in a discharge order. I agree that the issue is of public importance and that its resolution is in the public

interest. (See *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, recently discussed by this Court in *Powers v. Mitchell*, 2019 NLCA 16).

[9] As succinctly noted by the Crown in its factum “[t]he phrase ‘when clinically indicated’ was not included as one of the conditions of the conditional discharge; rather, it was incorporated into the preamble, seemingly operating as a pre-condition to the conditional discharge”.

[10] Both the appellant and the Crown submitted that such a pre-condition is an improper sub-delegation of the Board’s authority to the treatment team.

[11] As support, the Crown cited *R. v. Head*, 2016 NLCA 45, 382 Nfld. & P.E.I.R. 339, at para. 36:

Generally, a person is either ready for a conditional discharge or they are not. While I am not prepared to conclude that a condition precedent built into a conditional discharge order is never appropriate, for example in order to complete the discharge process from the hospital or to provide for the occurrence of a discrete event such as the administration of medication, the Board must be careful not to issue orders which take the ultimate issue of whether or not the person concerned is to be detained or discharged outside of its control. For example, an order making the discharge contingent on the exercise of someone else’s unfettered discretion constitutes improper sub-delegation (*Brant Dairy Co. v. Milk Commission of Ontario*, [1973] S.C.R. 131 at 146-148).

[12] Clearly, if the Board determines that a person subject to its review is ready for discharge, the appropriate remedy is to order a discharge – either absolute or with conditions. If the Board determines that a person is not ready for discharge, it is not open to the Board to transfer its authority to make a later finding on the appropriateness of a discharge to any other person. As stated in *Head*, this would constitute improper sub-delegation.

[13] As also noted by both the appellant and the Crown it is open to the Board to postpone the coming into effect of its disposition as permitted by section 672.63 of the *Code*:

A disposition shall come into force on the day on which it is made or on any later day that the court or Review Board specifies in it ...

[14] A later date than that of the hearing will often be appropriate as it would not be unusual for the treatment team to require time to complete such matters as finalizing living arrangements. Including such a delayed effective date would not constitute improper sub-delegation.

[15] As noted by counsel for the Crown, this Court utilized the phrase “when clinically indicated” in its substitute order in *Head*. While the phrase was utilized, it was only in relation to certain privileges which might potentially be granted to Mr. Head while he remained an in-patient at the hospital – not as a pre-condition to the coming into effect of the disposition order itself.

[16] Making certain conditions of a discharge or detention order applicable “when clinically indicated” is not equivalent to including a pre-condition on a discharge or detention order itself. The latter is a task that the Legislature has directed the Board to make, and cannot be sub-delegated. In contrast, the Legislature has empowered the Board to order conditions on discharge or detention, which, as a matter of practicality, may require clinical determinations. As in the order in *Head*, certain designated privileges “while in hospital” – such as permission to “go off the unit and off-grounds” – can be left to the discretion of the treating psychiatrist.

[17] While moot to the extent that the appellant had been discharged well before the hearing of this appeal despite the impugned language of the order, I would, nevertheless, pursuant to section 672.78(3), vary the order by deleting the phrase “when clinically indicated”.

[18] I would allow the appeal. The Board erred in law by attempting to delegate its authority. It should be clear from the order that the decision on whether an accused is discharged or detained is made by the Board, not a delegated decision-maker.

C. W. White J.A.

I Concur: _____

D. E. Fry C.J.N.L.

I Concur: _____

W. H. Goodridge J.A.